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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 27–37) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (Pet. 27). A petition for rehearing was denied on June 22, 1956. The petition for a writ of certiorari was filed on July 18, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was sub-

poenaed to appear before a grand jury, investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, said he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts. The District Court ruled, after a hearing in which petitioner attempted to justify his claim of privilege, that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court summarily cited him for contempt under the authority of 18 U. S. C. 401 (3) and the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure. The questions presented are:

1. Whether the District Court properly held that the privilege against self-incrimination did not attach to questions relating to the whereabouts of the books and records of a union of which petitioner was secretary-treasurer.

2. Whether, in these circumstances, the District Court committed reversible error in not granting petitioner's request, two days after the hearing in which the court ruled on his claim of privilege, for time to produce witnesses and documents in support of his claim of privilege.

3. Whether, in these circumstances, the District Court was required to furnish petitioner's counsel with a transcript of the entire grand jury testimony before ruling on the claim of privilege.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open

court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, Judge Gregory F. Noonan cited petitioner for contempt of court under the authority of 18 U. S. C. 401 (3) and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3). Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (A. A. 41–42).[1]

This contempt citation grew out of the following circumstances:

On April 10, 1956, in answer to a subpoena to appear before a grand jury in the Southern District

[1] "A. A." designates the Appellant's Appendix in the Court of Appeals, which is a part of the record filed in this Court. Appellee's Appendix in the Court of Appeals, also filed as part of the record, will be referred to by the symbol "G. A."

of New York and testify to all he knew with regard to an alleged violation of the federal-conspiracy statute, 18 U. S. C. 371 (A. A. 47), petitioner appeared but declined to answer certain questions until he had consulted his attorney (G. A. 2–7). He was excused and ordered to return on April 12, 1956, with the books and records of Local 269 of the International Brotherhood of Teamsters which had been demanded in the subpoena duces tecum (A. A. 48–50) already served on him in his official capacity as secretary-treasurer of the union (G. A. 7).

On April 12, 1956, petitioner appeared with three persons, two of them attorneys (G. A. 9, 44), who stayed in an anteroom while petitioner testified before the grand jury, and with whom petitioner consulted frequently, with the permission of the grand jury foreman.[2] Petitioner stated that he was the

[2] Petitioner consulted his attorney when asked the following questions:

"In whose possession are those records?" (G. A. 9–10). After consultation, petitioner declined to answer on the ground that it might incriminate him (G. A. 10).

"You've been an officer of other labor unions?" (G. A. 11). After consultation, petitioner replied that he had (G. A. 11).

"In your experience as a labor union officer, would you say that it's usually a function of the secretary-treasurer of a local to maintain custody of books and records?" (G. A. 11–14). After consultation, petitioner declined to answer on the ground of incrimination (G. A. 14–15).

"Did you, of this other labor union, have custody of the books and records?" (G. A. 15–16). After consultation, petitioner claimed privilege (G. A. 16). After the foreman directed petitioner to answer this question, he again consulted his attorney for four minutes (G. A. 17–18) and then answered that he did (G. A. 18).

"Referring to Local 269 of the International Brotherhood of

Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (G. A. 10); that the union had books and records to his knowledge (G. A. 19); that he had seen them (G. A. 31); but that they were not in his possession (G. A. 20). He refused, on the ground of self-incrimination, to state what kind of books they were (G. A. 21); whether he ever had custody of the books (G. A. 22); where the records were at specific times (G. A. 24, 25, 32, 33); whether John DioGuardia had ordered him not to produce the books (G. A. 30); and who had possession of the records at that time (G. A. 33). He was warned that refusal to answer proper questions would constitute contempt (G. A. 34). He was then excused with instructions to return on April 17, 1956 (G. A. 44).

On April 17, 1956, petitioner, accompanied by his attorney, Mr. Arnold Cohen, who had also accompanied him on April 12th to the grand jury hearing, reappeared before the grand jury and declined, again on the ground of self-incrimination, to answer any of the following questions, which were a portion of the

---

Teamsters, to your knowledge are there any books and records of this local?" (G. A. 18-19). After a consultation of four minutes, petitioner replied that there were (G. A. 19).

"To your knowledge where were the records of Local 269 a week ago today?" (G. A. 24). After consultation for five minutes, petitioner claimed the privilege (G. A. 24).

"Mr. Curcio, do you know a James Hoffa who is Vice-President of the International Brotherhood of Teamsters?" (G. A. 36). After consultation, petitioner claimed the privilege (G. A. 36).

"What printer did you order those letterheads from?" (G. A. 39). After consultation, for over five minutes, petitioner answered the question (G. A. 40).

questions which had been asked at the April 12th hearing (G. A. 45–50):

I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

* * * * *

Mr. Curcio, have you ever had possession of the books and records of this local?

* * * * *

Did you have custody and control of these records last Thursday?

* * * * *

Do you have possession of those records or any of them today?

* * * * *

Do you have custody and control of any of these records today?

* * * * *

Where are any of those records today, if you know?

* * * * *

Who has any of those records today, if you know?

* * * * *

Where were any of these records or all of these records a week ago Thursday?

* * * * *

Where were any or all of these records a week ago Saturday?

* * * * *

Where were any or all of these records a week ago yesterday, Monday?

* * * * *

Where were any or all of these records this past Thursday?

* * * * *

Where are any or all of these records today?

* * * * *

Who, if you know, had any or all of these records a week ago Saturday?

* * * * *

Who had any or all of these records a week ago yesterday?

* * * * *

Who has any or all of these records today?

* * * * *

The grand jury recessed and reconvened later the same day before District Judge Noonan, at which time petitioner was asked the same questions he had previously refused to answer that morning, was directed by the foreman of the grand jury to answer them, and declined to do so on the ground of self-incrimination (A. A. 3–9). Petitioner's counsel asked for and was denied a transcript of the grand jury testimony (A. A. 4–5). The Assistant United States Attorney gave Judge Noonan the background of petitioner's refusal and Judge Noonan then asked petitioner's attorney, Mr. Cohen, just how the answering of these questions posed on April 17th would incriminate petitioner (A. A. 10). Mr. Cohen gave the following explanation (A. A. 10–11):

The witness, I have been informed, did at one time answer questions that he did not have

possession of the books and records. That certainly takes care of the subpoena duces tecum which was served upon him. Any other question relating to "Did you ever have possession" or "Do you know who has possession" I feel that his privilege goes to these questions and answers, because the nature of the investigation before the Grand Jury, if we are to try to get our information from the press, is to investigate racketeering in trucking and food local unions.

In addition to that, we have here a civil action which is now being litigated, I think, on the 15th floor of this court.

Insofar as the nature or purpose of any investigation by the Grand Jury relating to those questions, the defendant in many ways could be tied in, not being able to find out or determine or not being permitted to find out or determine the nature of the investigation in question, and he has the right, if in his mind he believes that the answer might incriminate him, to assert the Fifth Amendment to protect himself. I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

After the court stated that the showing was insufficient to support the claim of privilege (A. A. 13), Mr. Cohen explained further (A. A. 14):

I believe that to some extent the investigation, as far as I have been informed by my client, by the jury, is going into the internal affairs of a

> labor organization. I believe if there is any suspicion, proof or reason to believe that any labor organization or any official of any labor organization has committed any crime, they should be vigorously prosecuted. But I also feel that the United States Attorney's office should not be used to go into the internal affairs of a labor organization and to ask questions that are not material or relevant to the purposes of convenience of this noble and honorable Grand Jury for the purpose of possibly establishing something which is the subject of litigation in another part of this building.

The court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the grand jury room and answer the questions just put to him before the court (A. A. 15). Neither petitioner nor his counsel asked for additional time to produce witnesses or documents in support of the claim.

On April 19, 1956, petitioner again appeared before the grand jury and declined to answer the questions he had been directed to answer by the court on April 17th (A. A. 18–19). He was then brought before Judge Noonan again, and, in the presence of the grand jury, Judge Noonan asked him the same questions he had previously been directed to answer. Petitioner declined to answer on the ground of self-incrimination (A. A. 26–28). His counsel sought to obtain another hearing so that he could prepare a defense and could produce witnesses and documents in support of the claim of privilege, although he did not explain what he hoped to prove by them. He

again asked for transcripts of the grand jury testimony (A. A. 20–21, 26, 30–31). The court ruled that since the contempt was committed in its presence a hearing was not necessary, but he did permit petitioner's counsel another opportunity to support the claim of privilege (A. A. 30–31). Petitioner's counsel stated (A. A. 32–33):

> I say that this investigation might lead to a conspiracy indictment; that the questions that are being asked might, in some way, be connected with or be part of or used for the conspiracy indictment. Having that in mind, in good faith, even though it might be an erroneous assumption of privilege, it is not contempt because certainly with the avenue of investigation today, we have to examine the atmosphere that we are living in, not only the jurisdiction of the federal but also the jurisdiction of the state, and there is certainly sufficient ground to believe that conspiracy might lie from the line of questions that are being asked. If that is in the witness's mind, as I know it is in the witness's mind, I say that he is properly exercising his constitutional guarantee under the Fifth Amendment not to answer these questions on the ground that the answers might incriminate him.

When the court said it did not see how these answers could incriminate petitioner in a conspiracy, petitioner's counsel offered to explain in the absence of the grand jury, but in the presence of the Assistant United States Attorney (A. A. 35). The court declined this suggestion and ruled petitioner in contempt (A. A. 35).

On appeal, petitioner submitted, as part of his appendix in the Court of Appeals, newspaper clippings relating to civil litigation over an election to the presidency of the Teamsters Joint Counsel between Martin T. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were mixed up with gangsters and racketeers, describing a so-called drive against city rackets by federal and local prosecutors, and naming one Johnny DioGuardio, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to pin down (A. A. 51–60). Considering petitioner's claim in the setting of what these clippings revealed, the Court of Appeals could find nothing that justified petitioner's claim of the privilege against self-incrimination in answering questions pertaining to the books and records of the union of which he was admittedly an official (Pet. 36–37). The Court of Appeals also held that petitioner had a fair hearing prior to the judge's ruling on the claim of privilege and was entitled to no further hearing under Rule 42 (a), applicable when a contempt is committed in the actual presence of the court, as it was here (Pet. 32–35). No error was found in the denial of the transcript of petitioner's grand jury testimony on April 12. The court noted that petitioner, at the hearing on the claim of privilege, intimated nothing about his testimony before the grand jury having a bearing on his refusals to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given

and, therefore, it was reasonable to suppose that his counsel could have directed the District Court's attention to any part of the testimony which might have supported the claim of privilege (Pet. 34–35).

ARGUMENT

The basic issue in this case is the legal question of whether the custodian of the books and records of an association, as to which he admittedly has no privilege, may refuse on the ground of his personal privilege to answer auxiliary questions as to the whereabouts of these books and records when he has failed to produce them pursuant to subpoena. The procedure adopted by the District Court, and the procedural issues raised by petitioner, fall into place when considered in relation to that basic question. We therefore discuss first the issue of privilege, and then the questions as to the validity of the procedure adopted by the District Court in this case.

1. It was established by the decision of this Court in *United States* v. *White*, 322 U. S. 694, 699, that the custodian of the books and records of an organization cannot refuse to produce them pursuant to subpoena even though the records might tend to incriminate the custodian personally. See also *Rogers* v. *United States*, 340 U. S. 367, 372. It follows, as a necessary corollary, that the person who would be the normal custodian of the organization's books cannot, on the basis of his personal claim of privilege, refuse to answer auxiliary questions with respect to the whereabouts of the books and records when he—the representative who should have them—has failed to produce them as directed by the subpoena. As noted by the

Court of Appeals (Pet. 35–36), the requirement to produce the books and records of an organization would be largely meaningless if the lawful custodian could hand them over to someone else and then refuse to answer all questions pertaining to their whereabouts, thus effectively crippling any investigation from the start. See *United States* v. *Field*, 193 F. 2d 92, 97, and 193 F. 2d 109, 111, certiorari denied, 342 U. S. 894, where the Second Circuit had previously held that the trustee of a bail fund was properly held in contempt for failure to produce records of the fund and to answer auxiliary questions relating to the location and production of such records. Cf. *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233–234 (C. A. 2), certiorari denied, 279 U. S. 863.[3]

[3] *United States* v. *Patterson*, 219 F. 2d 659 (C. A. 2), cited by petitioner (Pet. 22), involved a failure to produce association records, not a refusal to answer questions as to their whereabouts, and was reversed because the government did not sustain its burden of proving that they were still in existence. Patterson had already served a criminal contempt sentence for failing to produce the receipt books of the organization for the Internal Revenue Service which wished to audit them. Upon release from prison he was again asked for them, and when he declined, the matter was referred to a grand jury for investigation of possible violation of the internal revenue laws relative to keeping books for tax purposes. The witness claimed his privilege and gave as his reason the fact that an answer as to the whereabouts of the books might create the impression that he had destroyed them. At the point cited by petitioner (Pet. 22), the Court of Appeals mentions the fact that the District Court upheld the privilege (219 F. 2d at 661, 662), but does not expressly approve its action. Moreover, in the present case, petitioner himself testified that he was not in possession of the records at the time of service of the subpoena (G. A. 32); there was therefore no possibility of his incriminating himself of having unlawfully destroyed the records after service of the subpoena.

For this reason, petitioner's argument (Pet. 22–25) that he had valid reason to believe that his answers to the question might involve him in racketeering charges is irrelevant. We may even assume *arguendo* that, if the books were petitioner's personal records, his claim of privilege might have been justified under the rule of *Hoffman* v. *United States*, 341 U. S. 479. But the questions on which the contempt citation rested related only to the union books as to which petitioner's personal privilege did not apply. The questions were not to petitioner as an individual, but to him in his representative capacity as the normal custodian of the union's books. The language of this Court's decision in *United States* v. *White*, 322 U. S. at p. 705 therefore applies to the questions as well as to the books:

> * * * The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

2. Since the only issue before the judge was petitioner's duty as a union officer to answer questions as to the whereabouts of the union books, the procedure followed by the District Court in this case was wholly adequate to assure petitioner of due process.

Petitioner strongly contends that he was denied adequate opportunity to be heard and to introduce evidence to demonstrate that the answers to questions put to him by the court at the behest of the grand jury would tend to incriminate him (Pet. 15–20). But, as we have shown above, petitioner's personal privilege was immaterial in relation to the questions,

put to him in his representative capacity, as to the location of the union's books. The legal issue of whether petitioner had the right to claim his personal privilege with respect to these union books had already been determined against him by the court on April 17, two days before the court itself asked the questions and then cited petitioner for refusal in its presence to obey its direction to answer. Five days before that ruling, on April 12, petitioner had been warned that his refusal to answer would constitute a contempt of court (G. A. 44), and his attorneys, who were present in the anteroom at the time, had ample time to marshal their arguments on what was a pure issue of law.

When petitioner refused, in the court's presence, to comply with its ruling that he was required to answer questions relating to the union's books, his summary conviction for contempt was entirely proper under Rule 42 (a). There were no controlling factual issues of any kind.[4] The fundamental issue involved, then or now, was petitioner's right to assert his personal privilege with relation to questions, put to him in his representative capacity as custodian, concerning the whereabouts of the union's books. Petitioner's deliberate refusal to answer these questions, as to which the court had ruled he had no privilege, was the means by which he could obtain a final judgment to raise that issue on appeal. But at the same time it was a deliberate refusal in the presence of the court to obey an order of the court, and therefore properly subject to immediate punishment under Rule 42 (a).

[4] Actually, the court did offer counsel another opportunity to justify his claim of privilege (see the Statement, *supra*, pp. 10–11).

The same procedure was followed in *Rogers* v *United States*, 340 U. S. 367, also involving a legal issue of the right to claim the privilege (in that case, the status of the right in the face of prior admissions).[5] See Brief for Petitioner, Nos. 20, 21, 22, O. T. 1950, pp. 54–58, and Brief for the United States, Nos. 20, 21, 22, O. T. 1950, pp. 51–53.[6]

3. In view of the nature of the issue which was before the District Court for determination, there was no necessity to furnish petitioner with a copy of the grand jury minutes. The fifteen questions which were brought before the court for a ruling all raised the one legal issue as to whether petitioner, as the union official normally charged with custody, was required to account for the whereabouts of union records. None of the other questions asked petitioner had or could have had any bearing on that legal issue.[7] Petitioner's argument here, as in all other phases, fails to note the distinction, which the gov-

[5] In *Carlson* v. *United States*, 209 F. 2d 209, 215 (C. A. 1), cited by petitioner as in conflict with the decision below (Pet. 19–20), there were factual issues as to the validity of the claim of privilege and the court held only that due process required a hearing before validity of the claim of privilege was determined. Here, the issue was one of law, and the court had held a hearing before determining that issue. In addition, petitioner's counsel had not made any proper offer of proof of any relevant fact.

[6] In the *Rogers* case, a petition for rehearing to this Court which complained of the Court's silence on the procedural due process issue (Petition for Rehearing, No. 20, O. T. 1950, pp. 6–10) was denied. 341 U. S. 912.

[7] In *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2), the other questions asked had a real bearing on the issue of danger presented by the particular questions on which the contempt proceeding was based.

ernment and the District Court sharply drew, between petitioner's position as custodian of the union books and petitioner's personal position as an individual. Only his duty as custodian is here involved.

CONCLUSION

The decision of the court below is in accord with established law. It is respectfully submitted that this petition for a writ of certiorari should be denied.

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AUGUST 1956.